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No. 83-2049

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL KUZMA, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, a pro se litigant, contends that he is entitled to attorney's fees under the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E).

1. Petitioner filed suit under the FOIA and obtained a judgment ordering the United States Postal Service to disclose four pages of material concerning an investigation of petitioner and his business. He then moved for attorney's fees of $1,000 and for $110 in costs and disbursements. The United States District Court for the Western District of New York denied the motion. Pet. App. 12-13.

The court of appeals affirmed the denial of attorney's fees (Pet. App. 12-14; 725 F.2d 16) on the authority of its decision in *Crooker* v. *United States Department of the Treasury*, 634 F.2d 48 (1980). *Crooker* held that the attorney's fees provision of the FOIA, 5 U.S.C. 552(a)(4)(E), did not authorize recovery of attorney's fees by a pro se prisoner.

The court of appeals stated that *Crooker* had "held out the possibility that a pro se litigant might be entitled to some fee award if he could show that he had forgone an opportunity to earn 'regular income for a day or more in order to prepare and pursue a *pro se* suit' " (Pet. App. 13) (quoting 634 F.2d at 49)). But the court noted that petitioner made no claim that he had been required to forgo income to pursue his FOIA suit (Pet. App. 13).

The government conceded that the FOIA allows all successful litigants, pro se or not, "reasonable * * * litigation costs reasonably incurred" (5 U.S.C. 552(a)(4)(E)). On the basis of that concession, the court of appeals reversed the district court's denial of petitioner's request for costs (Pet. App. 13-14).

2. Petitioner's contention that he is entitled to attorney's fees is indistinguishable from the contention this Court declined to review in *Barrett* v. *Bureau of Customs*, cert. denied, 455 U.S. 950 (1982). For the reasons stated in our brief in opposition in *Barrett*,[1] the court of appeals' decision is correct. The FOIA makes the government liable for "reasonable attorney fees * * * reasonably incurred" by a prevailing party (5 U.S.C. 552(a)(4)(E)); because petitioner retained no attorney and incurred no fees, he is ineligible for an award under the plain language of the statute. As we explained in our brief in opposition in *Barrett* (at 5-6), the legislative history of the attorney's fees provision of the FOIA shows that Congress intended to help remove the obstacles to litigation that are created when a litigant must pay an attorney; there is no indication that Congress intended to compensate the litigants themselves for the time and energy they invest in litigation. Congress presumably wished to encourage litigants to retain attorneys, because a

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[1]We have sent a copy of this brief (No. 81-5633) to petitioner.

pro se litigant may lack sufficient objectivity and detachment in evaluating his own claim. Finally, as we explained in our brief in opposition in *Barrett* (at 6), determining the proper fee to award a pro se litigant is likely to prove an intractable task; moreover, it is unlikely that Congress intended to create a "cottage industry" in pro se FOIA litigation.

It appears that, with one exception, every circuit with jurisdiction over FOIA cases would have denied petitioner attorney's fees under the FOIA or similar attorney's fees provisions of other statutes. *Crooker* v. *United States Department of Justice*, 632 F.2d 916 (1st Cir. 1980) (FOIA); *Cunningham* v. *FBI*, 664 F.2d 383, 385 (3d Cir. 1981) (FOIA); *White* v. *Arlen Realty & Development Corp.*, 614 F.2d 387 (4th Cir.), cert. denied, 447 U.S. 923 (1980) (Truth in Lending Act, 15 U.S.C. 1640(a)(3)); *Barrett* v. *Bureau of Customs*, 651 F.2d 1087 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982) (Privacy Act, 5 U.S.C. 552a);[2] *Wolfel* v. *United States*, 711 F.2d 66, 68 (6th Cir. 1983) (FOIA); *DeBold* v. *Stimson*, 735 F.2d 1037, 1041-1043 (7th Cir. 1984) (FOIA and Privacy Act); *Davis* v. *Parratt*, 608 F.2d 717 (8th Cir. 1979) (Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988); *Hannon* v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976) (Truth in Lending Act); *Burke* v. *United States Department of Justice*, 559 F.2d 1182 (10th Cir. 1977), aff'g 432 F. Supp. 251 (D. Kan. 1976) (FOIA); *Clarkson* v. *IRS*, 678 F.2d 1368, 1371 (11th Cir. 1982) (FOIA).

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[2]A divided panel of the Fifth Circuit has held, however, that pro se litigants who are attorneys can recover attorney's fees. *Cazalas* v. *United States Department of Justice*, 709 F.2d 1051, 1055-1057 (1983). We did not seek review of *Cazalas*. The Sixth Circuit has explicitly ruled that pro se litigants who are attorneys are not entitled to fees, and this Court declined to resolve the conflict in the circuits. *Falcone* v. *IRS*, 714 F.2d 646 (1983), cert. denied, No. 83-741 (Mar. 26, 1984).

The sole exception is the District of Columbia Circuit, as petitioner correctly notes (Pet. 3-4). See *Crooker* v. *United States Department of the Treasury*, 663 F.2d 140 (1980); *Cox* v. *United States Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979); *Holly* v. *Acree*, 72 F.R.D. 115 (D.D.C. 1976), aff'd *sub nom. Holly* v. *Chasen*, 569 F.2d 160 (D.C. Cir. 1977) (Table). But this conflict existed when the Court declined to review *Barrett*. It is, if anything, even less in need of resolution by this Court now, in view of the unanimity of the courts of appeals other than the District of Columbia Circuit. As we explained in our brief in opposition in *Barrett* (at 8), the issue is of limited practical importance, and the District of Columbia Circuit, which has not yet been asked to consider the issue en banc, may be persuaded to alter its solitary stance.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

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[3]Petitioner emphasizes (Pet. 8-9) the Second Circuit's distinction between pro se litigants who forgo other gainful activities and those who do not. We agree with petitioner that this distinction has no foundation in the FOIA attorney's fees provision. But the Second Circuit has never awarded attorney's fees to any pro se litigant, or even unequivocally stated that it would do so; it has merely said that the question whether fees would be awarded to pro se litigants who had forgone other income remains unresolved. The possibility that the Second Circuit may, in some future case, take a position that is excessively favorable to pro se litigants is obviously not a reason for the Court to review this Second Circuit decision at the behest of a pro se litigant.